Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs

2004

State of Utah v. Gordon R. King : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2

 Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Jeffrey S. Gray; Assistant Attorney general; Mark L. Shurtleff; Utah Attorney General; T. Langdon Fisher; Salt Lake District Attorney\'s Office; Attorney for Petitioner.
Elizabeth Hunt; Attorney for Respondent.

Recommended Citation
Reply Brief, *Utah v. King*, No. 20040727.00 (Utah Supreme Court, 2004).
https://digitalcommons.law.byu.edu/byu_sc2/2538

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH SUPREME COURT
BRIEF
UTAH
DOCUMENT
K F U
45.9
.59
DOCKET NO. 20040727-SC

IN THE UTAH SUPREME COURT

STATE OF UTAH, **Plaintiff/Petitioner,** **vs.** **GORDON R. KING,** **Defendant/Respondent.**	**Case No. 20040727-SC**

REPLY BRIEF OF PETITIONER

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

T. LANGDON FISHER
Salt Lake District Attorney's Office

Counsel for Petitioner

ELIZABETH HUNT
569 Browning Ave.
Salt Lake City, UT 84105
(801) 461-4300

Counsel for Respondent

FILED
UTAH APPELLATE COURT
MAY / 4 2005

IN THE UTAH SUPREME COURT

STATE OF UTAH, **Plaintiff/Petitioner,** **vs.** **GORDON R. KING,** **Defendant/Respondent.**	**Case No. 20040727-SC**

REPLY BRIEF OF PETITIONER

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

T. LANGDON FISHER
Salt Lake District Attorney's Office

Counsel for Petitioner

ELIZABETH HUNT
569 Browning Ave.
Salt Lake City, UT 84105
(801) 461-4300

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE RULES

IN THE SUPREME COURT OF UTAH

STATE OF UTAH, **Plaintiff/Petitioner,** **vs.** **GORDON R. KING,** **Defendant/Respondent.**	**Case No. 20040727-SC**

REPLY BRIEF OF PETITIONER

* * *

ARGUMENT

Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in reply to the new matters raised in respondent's brief.

A. THE ADEQUACY OF VOIR DIRE TURNS ON WHETHER THE TRIAL COURT AFFORDED COUNSEL AN OPPORTUNITY TO ELICIT RELEVANT INFORMATION.

Even though defense counsel told the trial court that the juror questioning was sufficient and passed jurors 2F and 18I for cause, defendant argues that the court of appeals correctly applied an abuse of discretion standard to the trial court's failure to further question the two jurors or remove them. *See* Resp. Brf. at 8-14.[1] According to defendant, the trial court cannot rely on the representations of counsel regarding voir dire because "the burden to

[1] On direct appeal, defendant acknowledged that because the jurors were not challenged at trial below, he was required to show plain error or ineffective assistance of counsel. Aplt. Brf. at 1.

conduct careful voir dire [falls] squarely on the shoulders of the trial courts." Aplt. Brf. at 9, 16. In a nutshell, defendant claims that an abuse of discretion standard is appropriate because the burden of conducting a careful voir dire is the exclusive responsibility of the trial court. This claim lacks merit.

It is true that "it is [the trial judge's] duty to see that the constitutional rights of an accused to an impartial jury is safeguarded." *State v. Dixon*, 560 P.2d 318, 319 (Utah 1977). It is likewise true that "[v]oir dire questioning is essential to choosing [that] impartial jury ...." *State v. Saunders*, 1999 UT 59, ¶ 33, 992 P.2d 951. However, the responsibility for the content and scope of the voir dire examination rests primarily with trial counsel. It is counsel who is in the best position to know which biases to explore because "only counsel will, at the beginning, have a clear overview of the entire case and the type of evidence likely to be adduced." *State v. Worthen*, 765 P.2d 839, 845 (Utah 1988). Thus, under Utah law, the trial court "may permit counsel or the defendant to conduct the [voir dire] examination of the prospective jurors or may itself conduct the examination." Utah R. Crim. P. 18(b). But if the court conducts the examination, it must give counsel an opportunity to ask or submit questions. Utah R. Crim. P. 18(b).

The trial court "ha[s] some discretion in limiting voir dire inquiry." *Saunders*, 1999 UT 59, ¶ 43. But this Court has held that "that discretion must be 'liberally exercised' in favor of *allowing counsel* to elicit necessary information for ferreting out bias, whether for a for-cause or a peremptory challenge." *Id.* at ¶ 34 (citation omitted) (emphasis added). In doing so, the trial court helps safeguard an accused's right to an impartial jury. *See Dixon*,

560 P.2d at 319. Accordingly, this Court has consistently defined the trial judge's voir dire obligation in terms of what questioning the trial court "allows" counsel to present.

In support of his claim that the trial court's voir dire was inadequate, defendant cites *State v. Ball*, 685 P.2d 1055 (Utah 1984), *State v. Worthen*, 765 P.2d 839 (Utah 1988), *State v. Bishop*, 753 P.2d 439 (Utah 1988), *overruled on other grounds by State v. Menzies*, 889 P.2d 393 (Utah 1994),[2] and *State v. James*, 819 P.2d 781, 798 (Utah 1991).. *See* Resp. Brf. at 9-10, 16. But these cases do not support that proposition. To the contrary, they hold that a trial court's voir dire examination will be insufficient only if the trial court does not "allow[ ] counsel to elicit [relevant] information from prospective jurors." *Worthen*, 765 P.2d at 845.

In *Ball*, the Court explained that "a party must be *allowed* to gather sufficient relevant information during voir dire" so he or she can make informed decisions when challenging prospective jurors. 685 P.2d at 1060 (emphasis added). The Court "h[e]ld that the failure of the [trial] court to permit counsel's inquiry was . . . error . . . ." *Id.*

In *Bishop*, the Court held that "whether the trial court abused its discretion in conducting voir dire *turns on whether, considering the totality of the questioning,* ***counsel was afforded an adequate opportunity*** *to gain the information necessary to evaluate jurors*." 753 P.2d at 448 (emphases added). The Court rejected Bishop's claims of inadequate voir dire because he had "not . . . establish[ed] that the court's interruptions and questioning

---

[2] *Menzies* overruled the automatic reversal rule applied in *Bishop*, which required reversal whenever a party was compelled to exercise a peremptory challenge on a prospective juror who should have been removed for cause, but was not. 889 P.2d at 397-98.

[during counsel's questioning of the prospective jurors] deprived him of the *opportunity* to discover information relevant to [the juror's] fitness for jury service." *Id.* (emphasis added).

In *Worthen*, the Court explained that "[a]lthough a trial judge has some discretion in limiting voir dire examinations, that discretion should be liberally exercised in favor of *allowing counsel to elicit information* from prospective jurors." 765 P.2d at 845 (emphasis added). Continuing, the Court held that "the fairness of a trial may depend on *the right of counsel to ask voir dire questions* designed to discover attitudes and biases, both conscious and subconscious, ..." *Id.* (emphasis added). The Court ultimately rejected Worthen's claim because "[t]he record simply [did] not demonstrate that the trial judge prevented counsel from exploring certain topics." *Id.*

In *James*, the Court reiterated that the trial court's discretion to limit voir dire "'should be liberally exercised in favor of *allowing counsel* to elicit information from prospective jurors.'" 819 P.2d at 798 (quoting *Worthen*, 765 P.2d at 845) (emphasis added). The Court explained that "trial courts can and should conduct voir dire proceedings in a way which not only meets constitutional requirements, but also *enables litigants and their counsel* to intelligently exercise peremptory challenges and which attempts, as much as possible, to eliminate bias and prejudice from the trial proceedings." *Id.* (emphasis added).

Other cases have likewise so held. As noted, this Court in *Saunders* held that "effective voir dire questioning of prospective jurors must not be prevented . . . ." 1999 UT 59, ¶ 34. The Court explained that a judge's discretion is broad when counsel's proposed questions "have no apparent link to any potential bias," but "narrows" when the proposed

questions "have some possible link to possible bias." *Saunders*, 1999 UT 59, ¶ 43. And "when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears. The trial court must allow such inquiries." *Id.* And in *State v. Wach*, 2001 UT 35, ¶ 42, 24 P.3d 948, the Court rejected a claim that possibly biased jurors should have been excused for cause because the defendant "failed to demonstrate that he was *not afforded an adequate opportunity* to gain the information necessary to evaluate [the] jurors . . . ." (emphasis added).

Defendant here has not alleged that he was prevented from eliciting more information from jurors 2F and 18I. *See* Resp. Brf. Nor could he. After juror 8H was called for additional questioning, the trial judge said, "I think we have probably talked to everyone else who raised their hand." R. 109: 50. Defense counsel agreed, replying, "I think so." R. 109: 50. Then, after questioning juror 8H, the judged asked, "[D]o both sides pass the jury for cause with those strikes noted?" R. 109: 53. Counsel responded, "Yes, your Honor." R. 109: 53. Not once did counsel ask that jurors 2F and 18I be questioned further.

Therefore, as in *Worthen*, "[t]he difficulty in this case is that the defendant has not demonstrated that he was prevented from asking proper questions." *Worthen*, 765 P.2d at 839. Despite given the opportunity to do so, he declined. "The record simply does not demonstrate that the trial judge prevented counsel from exploring certain topics," i.e., the details of the two jurors' first- or second-hand experience with abuse. Where the trial court did not limit the voir dire examination, there can be no claim that it abused its discretion. Therefore, its failure to ask additional questions can only be reviewed for plain error. *See*

State v. Litherland, 2000 UT 76, ¶¶ 7-8, 12 P.3d 92; *State v. Olsen*, 860 P.2d 332, 333-34 (Utah 1993); *see also* Pet. Brf. at 10-15.

B. THE JURORS' ASSURANCES THAT THEY COULD BE FAIR WERE SUFFICIENT TO REBUT ANY INFERENCE OF BIAS.

Defendant argues that jurors 2F and 18I were "presumptively biased" and that the inference of bias was not rebutted. *See* Resp. Brf. at 13-14. He claims that the jurors' assurances that they could be impartial notwithstanding their first- or second-hand experience with abuse were insufficient to rebut the inference. Resp. Brf. at 13. However, defendant cites no authority in support of this claim. An examination of the relevant case law reveals that any inference of bias was sufficiently rebutted by their assurance of impartiality.

It is true that when a potentially biased juror is challenged for cause, the juror's statement alone that she can be fair and impartial is usually insufficient to rebut the inference of bias. *See Jenkins*, 627 P.2d at 536. However, when the juror's assurance is not challenged by counsel, the trial court can properly rely on that assurance. In *Saunders*, this Court explained:

> [A] juror's statement alone that he or she can decide a case fairly pursuant to the law given by the trial court is not a sufficient basis for qualifying a juror *when* [1] the prospective juror's answers provide evidence of possible bias *and* [2] the trial court does not allow further questions designed to probe the extent and depth of the bias.

Saunders, 1999 UT 59, ¶ 36 (emphasis added). When both conditions are present, the assurance is not satisfactory. However, when only one condition is present, the assurance is sufficient. As discussed, the trial court below did not prevent counsel from asking further

questions. Counsel agreed that all those who needed to be questioned had been questioned and passed the two jurors for cause. Because the trial court allowed further questioning, the jurors' assurances were sufficient to rebut any inference of bias.

C. THE REMOVE-OR-REHABILITATE RULE APPLIES ONLY WHEN A CHALLENGE IS MADE TO A POTENTIALLY BIASED JUROR.

Defendant also relies on *State v. Wooley*, 810 P.2d 440 (Utah App.), *cert. denied*, 826 P.2d 651 (Utah 1991), for the proposition that a trial court abuses its discretion if it does not remove a potentially biased juror or rehabilitate the juror through further inquiry. Resp. Brf. at 11. *Wooley*, in turn, relied on this Court's decision in *State v. Cobb*, 774 P.2d 1123 (Utah 1989). In *Cobb*, the Court articulated a "remove-or-rehabilitate" rule: "When comments are made which facially question a prospective juror's impartiality or prejudice, an abuse of discretion may occur unless the challenged juror is removed by the court or unless the court or counsel investigates and finds the inference rebutted." *Id.* at 1126.

As explained in the State's opening brief, this abuse of discretion standard applies only where the juror is "challenged" by counsel. *See* Pet. Brf. at 10-15. Otherwise, the Court will review the claim on appeal only upon a showing of plain error or ineffective assistance of counsel. *Cobb* is a case on point.

On appeal, Cobb claimed that the trial court erred in failing to dismiss two prospective jurors for cause: Joyce Lloyd, because of her prior acquaintance with the prosecuting attorney, and Jesse Holden, because he stated during voir dire that "he had 'very, very strong feelings about the taking of human life.'" *Cobb*, 774 P.2d at 1125-26. This Court examined the voir dire inquiry of Ms. Lloyd under the remove-or-rehabilitate rule and concluded that

the trial court did not abuse its discretion in refusing to dismiss her. *Id.* at 1226. However, the Court held that it was precluded from reviewing Cobb's claim that Mr. Holden was biased because of his strong feelings about the taking of human life. The Court observed that "defendant did not raise this claim [of bias] below," but challenged Mr. Holden on other grounds. *Id.* After observing that "the grounds for an objection must be specifically and distinctly stated," the Court held that "[f]ailure to meet these requirements precludes review of defendant's claim [of juror bias] on appeal." *Id.*[3]

Under *Cobb*, therefore, this Court will not review for an abuse of discretion a trial court's failure to remove or rehabilitate a potentially biased juror if there is no specific challenge to that juror. In that case, a claim of juror bias raised for the first time on appeal can be made only upon a showing of plain error. *See Litherland*, , 2000 UT 76, ¶¶ 7-8; *Olsen*, 860 P.2d at 333-34.

D. SOUND POLICY SUPPORTS APPLICATION OF THE REMOVE-OR-REHABILITATE RULE ONLY WHEN A POTENTIALLY BIASED JUROR IS CHALLENGED DURING VOIR DIRE AND THE SHOWING OF ACTUAL BIAS WHEN NO CHALLENGE IS MADE TO THE JUROR.

Sound policy supports application of the remove-or-rehabilitate rule only when a potentially biased juror is challenged during the voir dire examination. During jury selection, "it is a simple matter to obviate any problem of bias simply by excusing the prospective juror and selecting another." *Jenkins v. Parrish*, 627 P.2d 533, 536 (Utah 1981).

---

[3] The Court then "consider[ed] arguendo" the merits of Cobb's claim that Mr. Holden was biased under the remove-or-rehabilitate" rule and concluded that the trial court did not abuse its discretion in refusing to dismiss him for cause. *Cobb*, 774 P.2d at 1126-28.

ADMITTEDLY BIASED JURORS

Could *not* be fair because of her experience as a former DCFS worker

Juror 17A

Juror 21C

Could *not* be fair because her son had been the victim of sexual abuse

Could *not* be fair because she and a family member had been victims of abuse

Juror 25D

Juror 4G

Could *not* be fair because she had some experience with sexual abuse

PROFESSED IMPARTIAL JURORS

Subject to *Wooley's* Remove-or-Rehabilitate Requirement

Juror 20J

Could be fair even though she had some experience with abuse

Could be fair even though he had some experience with abuse

Juror 8H

Juror 28K

Could be fair even though she had some experience with abuse

—Defense Did Not Request Additional Questioning—

Could be fair even though had some experience with abuse

Juror 2F

Juror 18I

Could be fair even though had some experience with abuse

Removed for Cause

Passed for Cause

Accordingly, this Court has emphasized that "trial judges should err on the side of caution in ruling on for-cause challenges and that the scope of judicial discretion accorded a trial judge must be evaluated in light of the ease with which all issues of bias can be dispensed by the simple expedient of replacing a questionable juror with another whose neutrality is not open to question." *Saunders*, 1999 UT 59, ¶ 51.

On the other hand, when a timely challenge to a potentially biased juror is not made and the juror is passed for cause, it is no longer "a simple matter to obviate any problem of bias simply by excusing the prospective juror and selecting another." *Jenkins*, 627 P.2d at 536 (Utah 1981). The jury has been selected, the remaining venire panel has been excused, and the possibly biased juror can no longer be replaced. And when the claim of juror bias is first raised on appeal, the evidence has been presented, the jury has rendered a verdict of guilty, and the defendant has been sentenced. Under these circumstances, it would not be sound policy to require a new trial based on the "possibility" a juror was biased.

Indeed, our courts have almost universally required a showing of actual bias before disturbing a jury verdict based on possible juror bias. The United States Supreme Court has concluded that "due process does not require a new trial every time a juror has been placed in a potentially compromising position." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 946 (1982). With perhaps a few exceptions, *infra*, a new trial is appropriate only upon a showing of actual bias. *Id.* at 215-17, 102 S.Ct. at 945-446. Accordingly, the Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215, 102 S.Ct. at 945.

As discussed, requiring the removal of a potentially biased juror *during* the jury selection process is sound policy because any concern of bias "can be dispensed by the simple expedient of replacing a questionable juror with another whose neutrality is not open to question." *Saunders*, 1999 UT 59, ¶ 51. And as discussed, such is not the case with a prospective juror who survived the selection process, passed for cause, and served on the jury. In that case, this Court has held that defendant must establish actual bias. *See Menzies*, 889 P.2d at 398 (holding that "[t]o prevail on a claim of error based on the failure to remove a juror for cause, a defendant must demonstrate prejudice, viz., show that a member of the jury was partial or incompetent"). The court of appeals below acknowledged that such a showing has not been made. *See State v. King*, 2004 UT App 210, ¶ 18, 95 P.3d 282.

But citing *State v. Pike*, 712 P.2d 277 (Utah 1985), defendant argues that a conviction may be reversed "solely because it appears that the right to an impartial jury has been jeopardized." Resp. Brf. at 11. *Pike* is inapposite.

In *Pike*, the arresting officer, who was also a witness at the scene of the altercation, spoke to three jurors during a trial recess about an injury he suffered at home. *Pike*, 712 P.2d at 279-80. When the trial court learned of the conversation, it questioned the officer about the encounter. *Id.* "The judge and counsel agreed to let the incident go until after the verdict was in and then to question the jurors involved in the conversation." *Id.* at 279 After the trial, the court questioned the jurors and determined that the conversation was innocuous. *Id.* The trial court denied Pike's subsequent motion for a new trial. *Id.*

In reversing, this Court observed that "[a]nything more than the most incidental contact during the trial between witnesses and jurors casts doubt upon the impartiality of the jury and at best gives the appearance of the absence of impartiality." *Id.* at 279-80. The Court determined that "the conversation amounted to more than a brief, incidental contact," that it "no doubt had the effect of breeding a sense of familiarity that could clearly affect the jurors judgment as to credibility," and that as such, it created a presumption of bias. *Id.* at 281. The Court concluded that any denial by the jurors that they were influenced by the encounter would not be sufficient to rebut the presumption of bias. *Id.* The Court so concluded because the contact created "the appearance of impropriety" and actual prejudice was "not provable." *Id.* at 280.

This case is unlike *Pike*. First, there is no "appearance of impropriety" on the part of the prosecution, as in *Pike*. And second, unlike jurors who have more than incidental contact with a key prosecution witness, impartiality can be established for jurors who have some unknown first- or second-hand experience with sexual abuse. This case proves the point.

Like jurors 2F and 18I, jurors 8H, 20J, and 28K had some ambiguous experience with sexual abuse. All three assured the court that they could be fair and impartial notwithstanding that experience. Further questioning revealed the extent of that experience and provided a basis for assessing the jurors' ability to judge impartially. Juror 8H's wife had been sexually abused as a child before he met her. R. 109: 51-53. Juror 20J had been the victim of sexual abuse as a teenager and her niece had been sexually abused four years earlier. R. 109: 35-38. Juror 28K's uncle had been accused of sexually abusing juror 28K's

seven-year-old cousin. R. 109: 42-44. The inference of bias in jurors 8H and 28K was rebutted and both passed for cause. *See* R. 109: 44, 53. It was not rebutted with respect to juror 20J and she was dismissed for cause. R. 109: 45.

In sum, the trial court's questioning of the three jurors enabled it to assess their ability to set aside their experiences and judge defendant impartially. Likewise, the ability of jurors 2F and 18I could be assessed in a post-trial hearing through questions similar to those presented to jurors 8H, 20J, and 28K. Defendant contends that such a hearing would violate rule 606(b), Utah Rules of Evidence. Resp. Brf. at 14. That rule, however, only prohibits a juror from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror's mental processes in connection therewith ...." Utah R. Evid. 606(b). No such an inquiry need be made. Questioning that revealed the nature and scope of the jurors' experience, as presented to jurors 8H, 20J, and 28K, would be sufficient and would not violate rule 606(b).[4]

Moreover, a rule that does not require a showing of actual bias would constitute a departure from this Court's approach in cases where a juror did not honestly answer a question in voir dire. This Court has adopted the two-part test articulated in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845 (1984), for determining whether a new trial is warranted where a juror failed to answer questions honestly during

---

[4] *See* Addendum A (Graphic Summarizing Voir Dire)

voir dire. *State v. Thomas*, 830 P.2d 243 (Utah 1992). Under that test, the defendant is entitled to a new trial "if the moving party demonstrates that (1) 'a juror failed to answer honestly a material question on voir dire,' and (2) 'a correct response would have provided a valid basis for a challenge for cause.'" *Id.* at 245 (quoting *McDonough*, 464 U.S. at 556, 104 S.Ct. at 850).

To determine whether the *McDonough* two-prong test has been met, this Court requires an evidentiary hearing by the trial court. *See Thomas*, 777 P.2d at 451 (remanding to trial court for evidentiary hearing); *State v. Evans*, 2001 UT 22, ¶ , 20 P.3d 888 (trial court holding evidentiary hearing on *McDonough* claim). In *Thomas* one juror failed to disclose that she had been the victim of a sexual assault and another juror failed to disclose that her child had been sexually abused. *Thomas*, 777 P.2d at 450. In *Evans*, a juror failed to disclose that her uncle was the chief deputy in the prosecutor's office. *Evans*, 2001 UT 22, ¶ 24. In both cases, disclosure during voir dire would have likely triggered the remove-or-rehabilitate rule. Nevertheless, neither disclosure was sufficient to require a new trial under *McDonough*. Defendants must establish actual bias. *See Evans*, 2001 UT 22, ¶ 28 (finding juror impartial after reviewing testimony regarding extent of relationship).

* * *

In sum, the policy considerations for requiring removal or rehabilitation of a potentially biased juror that is challenged during voir dire do not apply to such a juror who is expressly passed for cause. In the former case, any concern of bias can be easily addressed by removing the juror and replacing him or her with a juror whose impartiality is not in

doubt. In the latter case, such a remedy is not available. As a general rule, this Court requires a showing of actual bias on a claim of juror bias. This case should be no different. An evidentiary hearing would reveal whether the two jurors' experiences were such as to create "light impressions" or impressions which are "strong and deep" and which will affect the jurors' impartiality. *Cobb*, 774 P.2d at 1126-27. Such a requirement is consistent with this Court's jurisprudence under the *McDonough* test.

E. DEFENDANT HAS NOT ESTABLISHED PLAIN ERROR OR INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendant contends that even if the court of appeals incorrectly applied the abuse of discretion standard, this Court should nevertheless affirm under plain error or ineffective assistance of counsel. Resp. Brf. at 14. This argument fails.

1. Plain Error Cannot Be Found Where No Case Law Has Applied the Remove-or-Rehabilitate Rule to Unpreserved Challenges and Where Defense Counsel Affirmatively Waived Any Alleged Error.

Defendant contends that the trial court's failure to sua sponte remove the two jurors was obvious error because, he alleges, the law is well-established that where voir dire reveals "jurors with experiences relating to crimes similar to those being adjudicated," trial courts are "require[d] . . . to remove the jurors for cause or to conduct in-depth voir dire rebutting their presumptive bias . . . ." Resp. Brf. at 15. This claim fails for two reasons.

First, as discussed above, the remove-or-rehabilitate rule has heretofore only been applied where there has been a challenge to the juror during voir dire. It has not been applied in a case, like here, where the jurors are passed for cause. Accordingly, any error could not be obvious. *State v. Dean*, 2004 UT 63, ¶ 16, 95 P.3d 276 (holding that to establish plain

error, defendant is required to "show that the law governing the error was clear at the time the alleged error was made"). And second, as discussed in the opening brief, defendant cannot claim plain error where he affirmatively waived any challenge, or invited the error. *See State v. Moton*, 749 P.2d 639, 642 (Utah 1988); *State v. DeMille*, 756 P.2d 81, 83 (Utah 1988) ("hold[ing] that DeMille's failure to voir dire the jurors on [child abuse or biases about defendant harming a child even though he had opportunity to do so] constitutes a waiver and bars inquiry into the bias question").

2. Ineffective Assistance of Counsel Cannot be Found Where There Has Been No Showing of Actual Prejudice.

Defendant contends that this Court should, in any event, affirm on the ground that his trial counsel was constitutionally ineffective. Resp. Brf. at 18-23. To prevail on a claim of ineffective assistance of counsel, defendant must show that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S 668, 687-88, 104 S.Ct. 2052, 2064 (1984). He can establish neither.

Defendant claims that counsel was deficient because he did not challenge the two jurors for cause. Resp. Brf. at 21-22. However, both jurors assured the court that their experience with sexual abuse would not affect their ability to be impartial. Counsel was present during the examination and it should therefore be assumed that based on the jurors' demeanor, counsel concluded that their responses were genuine. *See id.* at 690, 104 S.Ct. at 206 (holding that "counsel is strongly presumed to have rendered adequate assistance").

As to part two of the *Strickland* analysis, defendant acknowledges that his "[c]ounsel did not know if jurors [2F] and [18I] were actual victims of child sexual abuse or relatives or

friends of victims." Resp. Brf. at 21. Defendant nevertheless argues that the possibility of juror bias based on their unknown experience with sexual abuse is sufficient to establish prejudice. Resp. Brf. at 22-23. This argument is incorrect. As with plain error, "[t]o maintain a[n] [ineffectiveness] claim that a biased juror prejudiced him, ... [defendant] must show that the juror was *actually biased* against him." *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir. 1995). As discussed above, defendant has failed to make that showing.

Defendant nevertheless argues that to the extent that the factual details of the jurors' legal bias are not in the record to further establish prejudice, this is attributable to the trial court's inadequate voir dire, an independent basis for reversal." Resp. Brf. at 23. This claim lacks merit. Under rule 23B, Utah Rules of Appellate Procedure, "[a] party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel." Utah R. App. P. 23B(a). Defendant thus had an opportunity to seek an evidentiary hearing on the issue, but failed to do so. Accordingly, his ineffective assistance of counsel claim must fail.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the State respectfully requests the Court to reverse the judgment of the court of appeals.

Respectfully submitted May 4, 2005.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

JEFFREY S. GRAY
Assistant Attorney General
Counsel for Petitioner

CERTIFICATE OF SERVICE

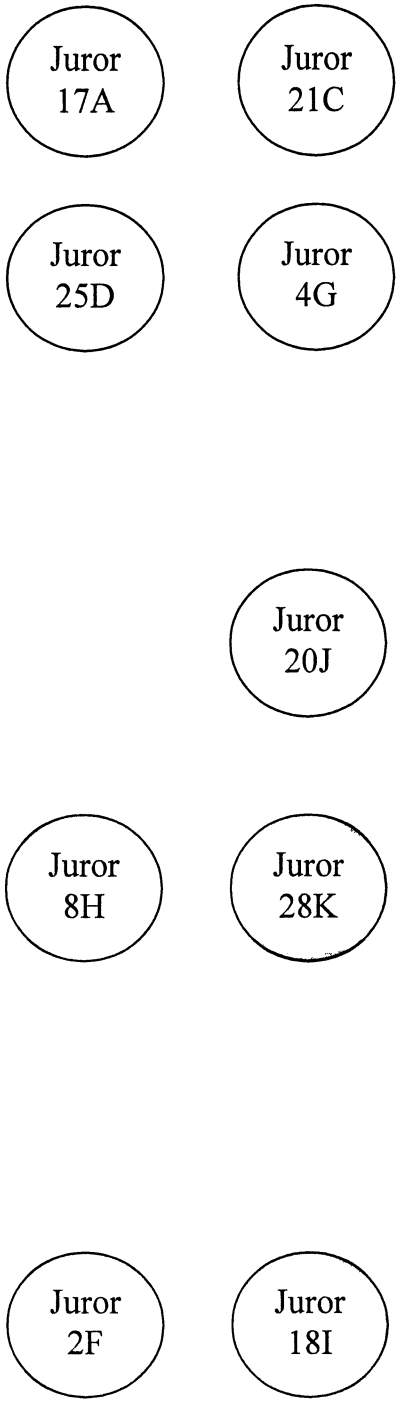
I hereby certify that on May 4, 2005, I served two copies of the foregoing Reply Brief of Petitioner upon the defendant/respondent, Gordon R. King, by causing them to be delivered by first class mail to his counsel of record as follows:

Elizabeth Hunt
569 Browning Ave.
Salt Lake City, UT 84105
(801) 461-4300

Jeffrey S. Gray
Assistant Attorney General

F \Jgray\C A S E S\King\King Gor cert rpl doc
5/4/2005 11 21 PM

ADDENDUM A


Juror
17A
Juror
21C
Juror
25D
Juror
4G
Juror
20J
Juror
8H
Juror
28K
Juror
2F
Juror
18I